

(2)

91-770

Case No. \_\_\_\_\_

Supreme Court, U.S.  
FILED  
NOV 4 1991  
OFFICE OF THE CLERK

UNITED STATES SUPREME COURT

1991 Term

JOSEPH C. KIRCHDORFER, INC.

Petitioner

v.

DONALD B. RICE, SECRETARY OF  
THE AIR FORCE,

Respondent

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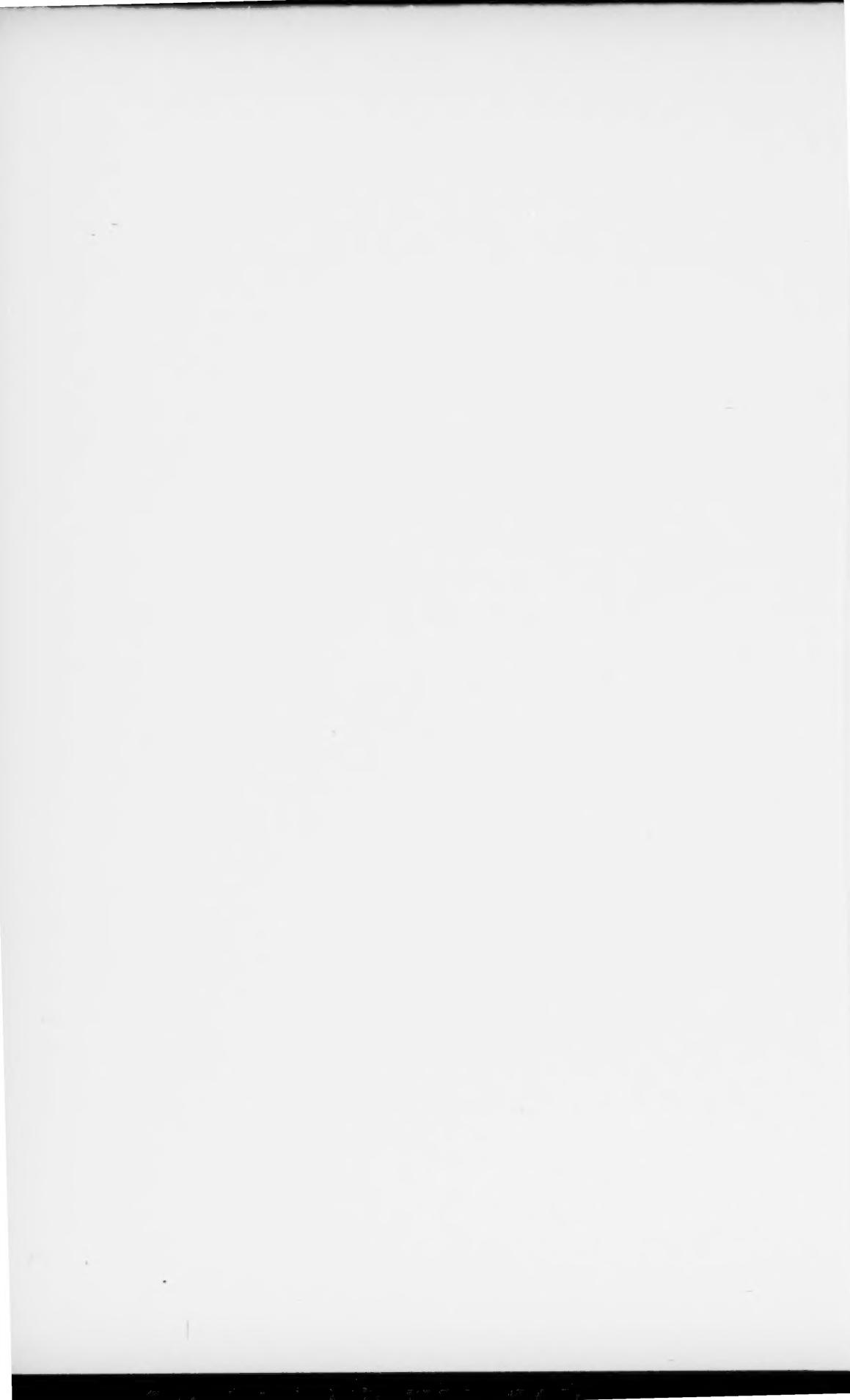
On Writ of Certiorari  
to the United States Court of Appeals  
For the Sixth Circuit

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APPENDIX  
VOLUME I

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1150 Starks Building  
Louisville, Kentucky 40202  
502-589-4600



UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

91-1151

SKIP KIRCHDORFER, INC.,  
Appellant,

v.

THE UNITED STATES,  
Appellee.

O R D E R

A suggestion for rehearing in banc  
having been filed in this case,

UPON CONSIDERATION THEREOF, it is  
ORDERED that the suggestion for  
rehearing in banc be, and the same hereby  
is, declined.

FOR THE COURT

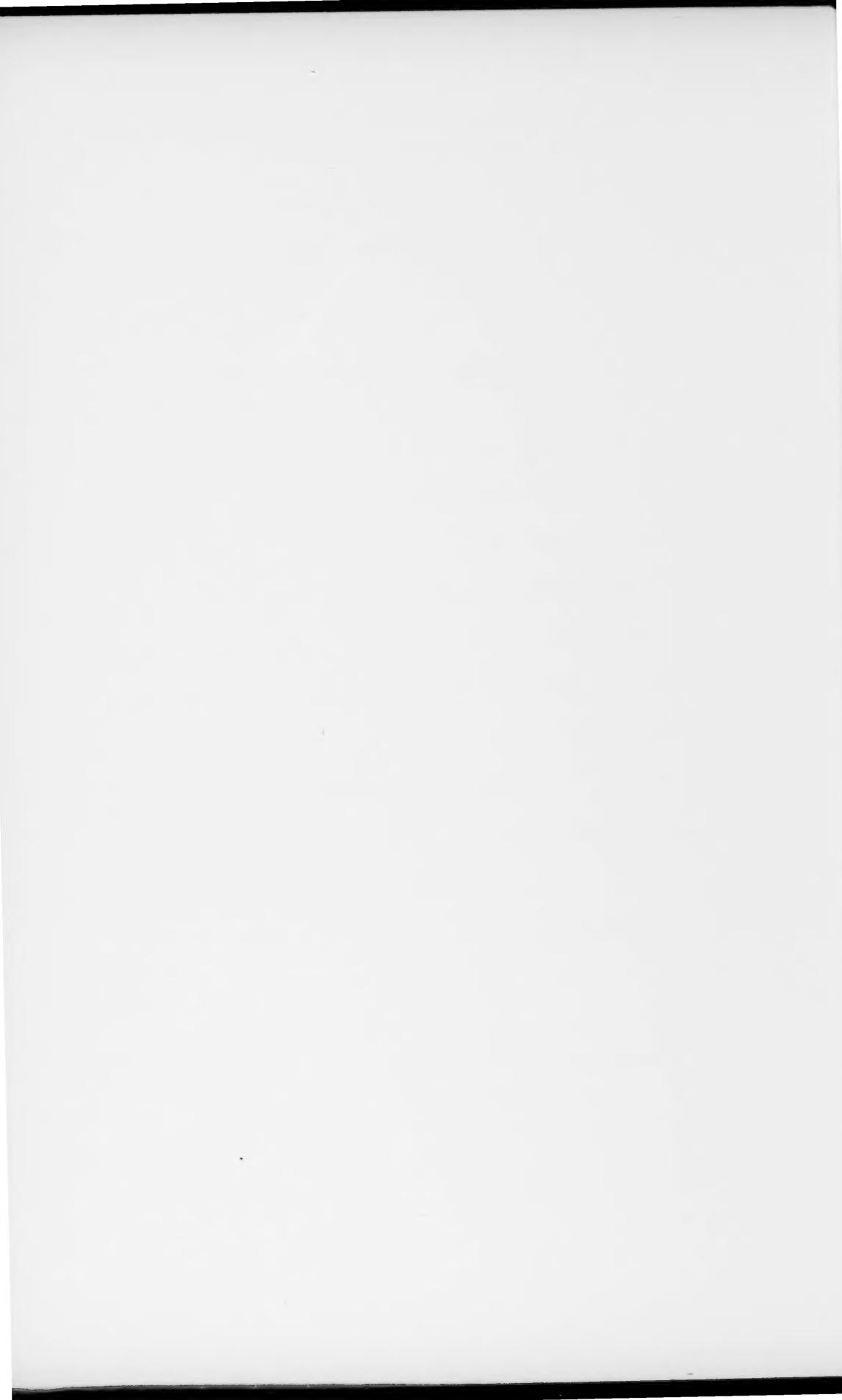
Dated: September 17, 1991

FRANCIS X. GINDHART, Clerk

SKIP KIRCHDORFER v. US, 91-1151

(BCA - 35074 & 32637)

Filed: US Court of Appeals for the  
Federal Circuit Sep 17 1991



UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

91-1152

SKIP KIRCHDOKFER, INC.,  
Appellant,

v.

THE UNITED STATES,  
Appellee.

O R D E R

Before LOURIE, Circuit Judge,  
BENNETT, Senior Circuit Judge, CLEVENGER,  
Circuit Judge.

A Petition for rehearing having been  
filed in this case,

UPON CONSIDERATION THEREOF, it is  
ORDERED that the petition for  
rehearing be, and the same hereby is,  
denied.

The suggestion for rehearing in banc  
is under consideration.

The mandate will issue on September  
12, 1991.

FOR THE COURT

Dated: September 5, 1991

FRANCIS X. GINDHART, Clerk

SKIP KIRCHDORFER v. US, 91-1151

(BCA - 35074 & 32637)

Filed: US Court of Appeals for the  
Federal Circuit Sep 5 1991

Note: Pursuant to Fed. Cir. R. 47.8, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

91-1151

SKIP KIRCHDORFER, INC.,

Appellant,

v.

DONALD B. RICE, Secretary  
of the Air Force,

Appellee.

JUDGMENT

On Appeal from the Board of Contract  
Appeals Armed Services  
In Case No(s) 35074 and 32637  
ORDERED and ADJUDGED:

Per Curiam: (Lourie, Circuit Judge,  
BENNETT, Senior Circuit Judge, and  
CLEVENGER, Circuit Judge):

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

Dated: August 6, 1991

FRANCIS X. GINDHART, CLERK

UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

NOTICE OF ENTRY OF JUDGMENT  
WITHOUT OPINION

JUDGMENT ENTERED: Aug 06 1991

The Judgment of the Court in your case was entered today pursuant to Rule 36. No opinion accompanied the judgment. The mandate will be issued in due course.

Costs may be recoverable under rule 39. A party entitled to costs is provided with a bill-of-costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs when taxed are payable to the party awarded its costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Costs should be paid promptly.

Exhibits and visual aids shall be promptly retrieved by the party that lodged them with this Court.

FRANCIS X. GINDHARD, CLERK

SKIP KIRCHDER V. US. 91-1151  
(BCA AS - 35074 & 32637)

**ARMED SERVICES BOARD OF CONTRACT APPEALS**

Appeals of -- ASBCA Nos. 32637 & 35074

Skip Kirchdorfer, Inc. )

Under Contract No. F08651-84-C-0123 )

**APPEARANCE(S) FOR THE APPELLANT:**

LAURENCE J. ZIELKE  
PEDLEY, ROSS, ZIELKE, GORDINIER  
& PORTER  
Louisville, Kentucky 40202

**APPEARANCE(S) FOR THE GOVERNMENT:**

Col. James C. Babin, USAR  
Chief Trial Attorney  
Mark E. Landers, Esquire  
COL Richard L. Farr, USAR  
Senior Trial Attorneys

**OPINION BY ADMINISTRATIVE JUDGE STEMPLER**

These are timely appeals from contracting officer final decisions.

ASBCA No. 32637 is an appeal from the termination for default of appellant's contract. ASBCA No. 35074 is an appeal from the denial of appellant's \$494,475 delay claim. ASBCA No. 35074 is before us on entitlement only. The Contract Disputes Act is applicable. A three week

trial was held at the Board starting on 13 March 1989. Both parties have filed post-trial brief.

#### **FINDINGS OF FACT<sup>1</sup>**

1. On 8 June 1984, the United States Air Force, Eglin air Force Base, Florida, and Skip Kirchdorfer, Inc. (SKI) entered into contract No. F08651-84-C-0123. The \$2,937.704 firm fixed-priced construction contract called for SKI to perform extensive improvements on 690 family housing units in the Plew housing section on the base. The housing project was divided into three sections: area I, II and III. Performance was to commence 5 days after receipt of the notice to proceed and be completed within 540 calendar days (23 January 1986). The contract contained the following relevant special provisions and full-text clauses:

#### **SP-10. INVOICES & PAYMENT**

Submit invoices in quadruplicate to the Administrative Contracting Officer, AD/PMMA-2, Eglin Air Force Base, Florida 32542. Payment will be made by AD/ACFCS-1, Eglin Air Force Base, Florida.

Payment for work covered by these specifications will be made in accordance with General Provisions DAR 7-602.7. No payment will be made for work accomplished without prior authorization of the Contracting Officer for items specified in paragraph 8.b, page 08200-2, and paragraph 8, page 09258-2 of the Specifications.

\* \* \*

SP-13. MATERIALS APPROVAL SUBMITTED

Within 10 days after commencement of work as otherwise established by the Contracting Officer, all material and articles requiring approval, as contemplated by the "Materials and Workmanship" clause, shall be submitted by the Contractor, by means of AF Form 3000.

SP-14. PERFORMANCE SCHEDULE

Performance period is based on the following schedule:

a. All Type 34 and Type 44 housing units in Area 1 and all Type 34, 36 and 44 housing units to have bathroom floors repaired in Area 2 will be unoccupied during performance of the contract work, but will contain Government-owned free standing kitchen ranges and

refrigerators. All other housing units will be occupied during performance of the contract work. The Contractor shall keep the kitchens and baths of all occupied housing units operational during the construction period by completing installation of the dishwashers, garbage disposals, range hoods, grease splashplates, and tub-shower enclosures the same day that work is begun on these items in a housing unit. New windows and doors shall be installed in the openings the same day the existing items are removed. New ceiling finish in housing units where ducts are required to be insulated shall be installed (excluding taping, finishing, and painting) with [sic] two (2) calendar days after existing ceiling finish is removed.

b. Work on each occupied housing unit may be done at any time during the contract period after all materials required for that housing unit are on hand and ready for use. No interior work shall be performed in a housing unit unless an adult (18 years or older) occupant of the unit is present. All interior work (dishwashers, garbage disposals, range hoods, grease splashplates, duct insulation, and all associated painting) on any one occupied housing unit shall be completed within four (4) working days after work is started on that housing unit. All work (exterior and interior) on any one occupied housing unit shall be completed within fifteen (15) calendar days after work is started on that housing unit.

c. Exterior and interior work on all unoccupied housing units will not

commence until 90 days after notice to proceed to provide time for submittal approval, and delivery of materials and to allow time for accumulation of vacant housing units. These housing units will be turned over to the Contractor according to the following schedule:

(1) Provide eight apartments (housing units) to the Contractor 90 days after notice to proceed.

(2) Provide four additional apartments 104 calendar days after notice to proceed.

(3) Thereafter, provide four additional apartments every seven calendar days.

(4) First eight apartments shall be completed within 28 calendar days after release of apartments to Contractor.

(5) Each remaining increment of four apartments shall be completed within 21 calendar days after release of apartments to Contractor.

d. The area where the contract work shall begin will be designated by the Government. Housing units will generally be made available within the same general area for accomplishment of the contract work; however, in some cases the contractor may be required to temporarily skip certain buildings due to non-availability at that time and to perform the work at a later date during the contract period. Repairing of

housing units shall be performed in a consecutive manner; proceeding randomly throughout the project site will not be allowed. The contractor shall notify the Government a minimum of seven (7) calendar days prior to starting work in each occupied housing unit.

NOTE: The day that work is started shall be included in the specified number of days allowed for completion of work specified in Paragraphs Sp-14a, b, and c above.

\* \* \*

COMMENCEMENT, PROSECUTION AND COMPLETION OF WORK (1965 JAN) DAR 7-602.44(a)

The Contract will be required to commence work under this contract within five (5) calendar days after the date of receipt by him of notice to proceed, to prosecute said work diligently, and to complete the entire work ready for use not later than five hundred forty (54)\* calendar days after receipt of notice to proceed. The time stated for completion shall include final clean-up of the premises.

\*See Special Provision SP-14 of the contract.

\* \* \*

LIQUIDATED DAMAGES (1965 JAN)-DAR 7-603.39

In case of failure on the part of the Contractor to complete the work

within the time fixed in the contract or any extensions thereof, the Contractor shall pay to the Government as liquidated damages, pursuant to the clause of this contract entitled "Termination for Default--Damages for Delay--Time Extensions," the sum of \$3.50 per day for each unoccupied housing unit for each day of delay within the time stated in accordance with Special Provision No. 14; in addition \$63.80 for each day of delay in completion for the total project.

(R4, tabs 4, 5)

2. The contract also incorporated by referenced the following relevant standard clauses: DAR 7-103.12(1), Disputes (1983 FEB); 7-602.3, Changes (1968 FEB); 7-602.5, Termination of Default--Damages for Delay-Time Extensions (1969 AUG); 7-602.7, Payments to Contractor (1982 DEC); 7-602.9, Material and Workmanship (1964 JUN); 7-602.10(a), Contractor Inspection System (1964 NOV); 7-602.11, Inspection and Acceptance (1976 OCT); 7-602.54(1), Shop Drawings (1976 OCT); and 7-603.48,

Progress Charts and Requirements for  
Overtime Work (1965 JAN) (R5, tab 5).

3. At the time of award, SKI had a housing maintenance contract on the base that was to end in November 1984. Mr. McDonald was SKI's project manager on the maintenance contract and was to be the project manager on the construction contract. Work under the maintenance contract gave SKI an opportunity to observe the condition of the units to be renovated under the instant contract. The Government extended the maintenance contract to 28 February 1985 and Mr. McDonald served as project manager for both contracts until the maintenance contract ended (tr. 1/46, 4/30-31, 5/238, 250; exh. A-113).

4. In 1981 or 1982, the Government has awarded a contract to renovate other housing on the base referred to as Wherry

housing. SKI based its bid price on the instant contract on what it believed to be the standard of workmanship acceptable under the Wherry contract. Mr. Skip Kirchdorfer<sup>2</sup> testified:

Q. How about your observations of workmanship under the Wherry Contract under A-122, how did that affect your entering into contract in the Plew Contract?

A. That's -- the standard of workmanship is what I based my bid price on.

Q. How can workmanship affect bid price that you would make?

A. Well, like on the soffit, for instance, I realize that I would not have to do any remedial work on the existing lookouts in areas like that. I knew that [sic] the matter [sic] in which the drip edge was installed. I knew what the doors would look like. Just standard of workmanship and what they considered acceptable work.

SKI originally bid on the Wherry solicitation but did not bid on the amended solicitation which resulted in the contract. Mr. Skip Kirchdorfer was

unaware of the modifications amending the contract or any waivers to the specifications granted by the government during performance. In preparing his bid for the contract in dispute, Mr. Skip Kirchdorfer observed the work done on the Wherry contract from his car (tr. 1/77-78, 106, 4/41, 314-15; exh. a-122).

5. A pre-performance conference was held on 23 July 1984. In attendance were: Mr. Herrin (government inspector), Mr. Hemmer (government technical representative and civil engineer), MSgt Karl Weise (government inspector), Mr. Day (contract administrator) and Mr. McDonald (SKI project manager). The government contends that it informed SKI at this meeting that the government was selecting, pursuant to special provision 14d, Palm Circle in Area II as the place where work was to commence. SKI denies

that it was so informed. Appellant presented testimony that by the time of this meeting, it had determined to begin work in Area I, but did not convey this information to the government. We find the government testimony more credible and determine that Mr. McDonald was advised by the government personnel present that the government wanted to commence at Palm Circle (R4, tab 9, SR4, tabs 2, 93 report 1; tr. 5/337-389, 9/7-8, 210).

6. A notice to proceed was issued by the government on 23 July 1984 and received by SKI on 1 August 1984 (R4, tab 8).

7. On 2 August 1984, SKI gave the government its ceramic tile submittal. On 10 August 1984, the government approved the submittal, stating that it

would make its color selections at a later date (exh. a-15).

8. On 17 September 1984, the government issued SKI a cure notice for failure to submit a progress schedule to the contracting officer pursuant to the Progress Charts and Requirements to the contracting officer pursuant to the Progress charts and Requirements for Overtime Work clause. All material submittals had not been submitted within 10 days as required by special provision (SP) 13 (r4, tab 11).

9. On 19 September 1984, Mr. McDonald called the government to discuss the cure notice. The parties also discussed the possibility that the government might want to revise the requirements for a door referred to as door number 2 and to change the status of

unoccupied units to occupied (SR4, tab 6).

10. On 19 September 1984, the government proposed to change the type of door for door no. 2 by contract modification and requested SKI's cost proposal (R4, tab 12).

11. On 20 September 1984, SKI submitted its material submittal for wood doors. The submittal contained insufficient data and was returned (tr. 9/12, 14, 19).

12. On 24 September 1984, SKI submitted its required progress schedule (R4, tab 13).

13. On 28 September 1984, the contracting officer disapproved SKI's schedule because it was not in the proper form and because it did not take into account that performance was to have

started 5 days after the notice to proceed was received (R4, tab 14).

14. On 1 October 1984, Skip Kirchdorfer discussed the door no. 2 and unoccupied to occupied changed with the government. Despite the government's prior discussions with Mr. McDonald, Skip Kirchdorfer had not been aware of the proposed changes and the government agreed to send him a copy of the government's proposal (SR4, tab 7).

15. On 3 October 1984, the government issued a show cause notice because an acceptable progress schedule had still not be submitted and all material submittals had not been made. The contracting officer reminded SKI that it was not allowed to work on occupied units until all materials for the units were on hand and ready for use and that 8 units were scheduled to be turned over

to SKI 90 days after the notice to proceed (R4 tab 15).

16. On 8 October 1984, SKI submitted a revised progress schedule and submitted its proposal for the change in the type of door no. 2. SKI requested a 60 day extension of for manufacture and delivery of the doors and no money for the change (R4, tabs 16, 17).

17. On 15 October 1984, SKI responded to the show cause notice, stating that the notice was without justification since the chart and submittals had been submitted prior to 4 October (R4, tab 18).

18. On 16 October 1984, SKI resubmitted the wood door submittal and the submittal was approved on 25 October, although the metal door louvers were disapproved (exh. A-21).

19. On 19 October 1984, SKI proposed a price increase of \$25,290 to change the housing units scheduled to be unoccupied in area I and area II from unoccupied to occupied (SR4, tabs 8, 9).

20. A new progress schedule was submitted by SKI on 22 October, 1984 (SR4, tab 93 report 20).

21. On 23 October 1984, SKI proposed several changes to the soffit and gable vents so that SKI's roof supplier's warranty would not be voided, at a cost to the government of \$42,385.59 (R4, tab 19).

22. On 25 October 1984, the government told SKI that the no cost portion of the door no. 2 change was acceptable but that the government did not agree that a 60 day extension was needed. The parties negotiated further over the extension, and on 21 November

1984, the government informed SKI that the government would not make the change to the contract's door requirements (SR4, tabs 10-11, 21, 22).

23. Also on 25 October 1984, the government proposed to modify the contract, making the unoccupied to occupied change. The government proposed changing SP 14 as follows:

SP 14Aa: Delete first sentence in its entirety. In second sentence, delete "other". In third sentence, of the occupied housing units, insert "except Type 34 and Type 44 housing units in Area I and all Type 34, 36 and Type 44 housing units to have bathroom floors repaired in Area 2."

SP 14b: In third sentence after "enclosures" insert "bathroom floor repairs".

SP 14c: Delete in its entirety.

SP 14d: Change Paragraph SP 14d to SP 14c.

(R4, tab 22).

24. On 25 October 1984, SKI notified the government that SKI had

suspended its material ordering for the doors during the parties' discussions concerning the possibility of changing door no. 2 and that a 45-day extension was necessary (R4, tab 23).

25. Bilateral modification P00001, with an effective date of 2 November 1984 was issued, implementing the unoccupied to occupied change and changing SP 14 as set forth in finding 1. The contract price was increased by \$25,118.10 and the contract completion date remained 23 January 1986. The modification also contained a release by SKI for the change (R4, tab 30).

26. On 2 November 1984, Scott Kirchdorfer and Mr. McDonald requested that the government allow SKI to start work on the units on Oak Drive (102 Oak) in Area I and moving to Palm Circle. (Oak Drive is actually in Areas I and II.

SKI wanted to complete Area I before moving to Area II. The contracting officer denied this request and stated that work would begin on the Palm Circle units and a written sequence would be issued (SR4, tab 15; tr. 5/131-33).

27. The materials required for the work in the units on Palm Circle were different in some respects for the work on the units on Oak Drive (tr. 12/24-25).

28. On 8 November 1984, SKI began construction of its on-site warehouse to store materials for the contract (SR4, tab 93 report 23; tr. 11/58).

29. Also on 8 November 1984, the government agreed to SKI's soffit vent changes but only at no cost to the government. The government would not agree to SKI's gable vent changes (R4, tab 28).

30. On 9 November 1984, SKI ordered the door manufacturer to begin production of the doors for the contract stating that the government had accepted the change in door no. 2 (exh. A-41).

31. On 14 November 1984, SKI ordered some of the windows for Area I, some of which were usable for Palm Circle in Area II (exh. A-44; tr. 2/24).

32. On 14 November 1984, a government inspector, Mr. O'Gallagher, discussed the scheduling of housing with Mr. McDonald. The inspector showed Mr. McDonald the government's schedule of houses to be worked on (SR4, tab 93 report 29; tr. 11/59).

33. On 16 November 1984, the parties met to discuss scheduling. Scott Kirchdorfer stated that construction would commence on 7 January 1985. SKI stated, however, that it had materials

ordered for Area I on Oak Drive and not for Area II on Palm Circle and therefore wanted to start on Oak Drive. The government insisted that work would start on Palm Circle (SR4, tab 93 report 13).

34. On 16 November 1984, the government sent SKI proposed modification P0002 which would have changed the type of door no. 2 at no cost and without at time extension and contained a contractor release. SKI refused to sign the modification, requesting a 60-day extension and stating that work on the contract was being suspended until the matter of door no. 2 was resolved (R4, tab 27, 32).

35. On 19 November 1984, SKI requested that the government rescind its cure and show cause notices because work had been suspended on the contract since 21 September 1984 due to the proposed

government changes. The parties discussed the matter further and on 22 November SKI was informed that P00002 would be cancelled. On 10 December 1984, the government did cancel the proposed change in writing and directed SKI to submit the door per the contract requirements (R4, tab 31, 35).

36. On 27 November 1984, SKI's door manufacturer refused to accept SKI's door order (exh. A-43).

37. On 6 December 1984, the contracting officer wrote SKI and provided a list of the sequence of houses which the government was requiring SKI to perform pursuant to SP 14d.<sup>3</sup> The government ordered work to begin at 108 Palm Circle (Area II) and proceed through Area II to Area I starting at 102 Oak, then proceeding through Area I to Area III. Skip Kirchdorfer testified, on

cross examination, that when he received the letter, he did not consider the letter to be a directive, despite the fact that the letter said the work "shall begin", nor was he concerned enough about the contents of the letter to contact the contracting officer. He merely filed the letter away, intending to speak to the contracting officer about the matter the next time he visited the site.<sup>4</sup> On direct examination, Mr. Skip Kirchdorfer testified that he planned to tell the contracting officer that he [the contracting officer] did not have the right to direct the sequence of houses and if that he wanted to change the contract, to let him know (R4, tab 33; tr. 2/36, 4/36-37, 11/55-56).

38. On 18 December 1984, SKI finished construction of its on-site

warehouse (SR4, tab 94 report 1; tr. 11/58).

39. SKI did not perform any on-site work from 19 December 1984 to 8 January 1985 (SR4, tab 94 report 2).

40. On 20 December 1984, SKI gave the government its submittal for door no. 2 (exh. A-25).

41. On 8 January 1985, the government received SKI's first invoice, for \$124,656. The parties conferred, and based on a contract completion figure of 2.65%, the invoice amount was changed to \$88,783.46. This amount was paid to SKI on 14 January (R4, tab 37; tr. 13/183).

42. On or about 9 January 1985, a partial shipment of windows became the first materials to arrive on site (SR4, tab 94 report 3; tr. 11/58-59).

43. By letter dated 10 January 1985, the government made its ceramic tile color selection (exh. A-16).<sup>5</sup>

44. SKI did not perform any on-site work on the contract from 10 January 1985 to 22 January 1985 (SR4, tab 94 report 4-6).

45. On 11 January 1985, according to its own schedule, SKI should have been 9.5% complete. The government wrote SKI stating that the contract was only 2.65% complete and requiring SKI to respond with a plan to get back on schedule (R4, tab 36).

46. On 14 January 1985, the parties met to determine what materials were present on the job site. Other than government furnished equipment, SKI had only some windows on-site, but promised that all major items would be on-site in 3 to 4 days (SR4, tab 94 report 7).

47. On 18 January 1985, SKI submitted its door submittals with a new door supplier. On 22 January, the government approved the doors (disapproving the metal louvers) (exh. A-27).<sup>6</sup>

48. SKI did not perform any on-site work from 23 to 31 January 1985 (SR4, tab 94 report 8).

49. On 24 January 1985, in response to the government's 11 January letter, SKI stated that there had bee no actual construction yet because progress had been stopped since 21 September 1984 due to the proposed change to the type of door for door no. 2 and that progress should start in about 6 weeks (R4, tab 38).

50. On 1 February 1985, the government discovered that SKI had removed the windows from 208A Elm Street

(in Area I) and installed new windows without the government's permission. The government informed SKI that the installation was poor (SR4, tab 94 reports 9, 11).

51. On 7 February 1985, the government disapproved SKI's soffit vent proposed change and SKI withdrew the proposal. (R4, tab 39).

52. From 15 February 1985, to 3 March 1985, SKI did not perform any on-site work (SR4, tab 94 report 18).

53. On 4 March 1985, the parties met to discuss the construction start date. The government reminded SKI that the contract required 7 days notice before working on an occupied unit, and that the government had directed that work would begin at Palm Circle. Mr. McDonald was unable to provide a start

date until he spoke to Skip Kirchdorfer (SR4, tab 94 report 19).

54. On 7 March 1954, the government paid SKI's 4 February 1985 invoice. The invoice was for \$59,404.23. After reductions for duplications of amounts already paid, the invoice was paid in the amount of \$41,037.23 (R4, tab 40; exh. A-116).

55. On 13 March 1985, the government inspectors and Mr. McDonald met at SKI's warehouse to inventory the material. Mr. McDonald was unable to give the government a firm start date but thought work might commence on 18 March. Mr. McDonald was reminded of the 7 day notice requirement and that work would begin on Palm Circle. Mr. McDonald then stated that work would not begin on Palm Circle (SR4, tab 94 reports 20, 21; tr. 12/12-13).

56. On 18 March 1985, SKI reported that it did not have all of the material to start on Palm Circle and still had no firm start date (SR4, tab 94 report 23).

57. On 19 March 1985, Mr. McDonald informed the government that work would start on 26 March (SR5, tab 94 report 24).

58. Virtually the only contemporaneous records made by SKI were random, cryptic notes kept by Mr. McDonald. Mr. McDonald's notes begin 19 March 1985 and stop on 18 September 1985 (exh. A-107; tr. 6/11-14, 23-28).

59. On 21 March 1985, Mr. McDonald informed the government that the doors would not arrive before 27 March and the countertops might be on-site by 25 March (Sr4, tab 94 reports 26, 27).

60. On 25 March 1985, the government inspected SKI's warehouse to

determine what material was on-site. All of the materials for any one unit on either Palm Circle or Oak Drive were not on-site. Missing items included: roofing supplies (said to be a locally available item), doors, sinks, countertops, and kitchen cabinets (Sr4, tabs 29, 104, 95 reports 29-30; tr. 12/22-25).

61. On 25 March 1985, SKI informed the government that it would begin work at 102 Oak Drive (in Area I) on 26 March and contended that it had 20 days per house to perform its work. The contracting officer said that personally it did not matter to him where work started, but that engineering wanted the work to begin on Palm Circle and that SKI had been directed to start on Palm Circle. SKI's written reply to this repeated direction to commence on Palm Circle was to allege that the government

was refusing to make units available to SKI and that the government had breached the contract and ordered the work to stop (R4, tab 42; SR4, tabs 27, 94 reports 29-30).

62. On 28 March 1985, the parties met to discuss the contract. SKI contended that SP14 allowed SKI to start in any occupied area as long as all materials were on hand and all materials were on hand for Oak Drive. Skip Kirchdorfer stated that the government had approved starting on Oak Drive to which the contracting officer replied that SKI had been directed to start at Palm Circle a number of times and had even been provided a detailed schedule by the government (SR4, tab 28).

63. As far as the Board can determine, the reason the government was insisting on work commencing on Palm

Circle, was because a colonel who lived there had initiated an Inspector General's investigation as to why his quarters did not have a dishwasher (SR4, tab 36).

64. On 2 April 1985, the contracting officer replied to SKI's 25 March 1985 letter. He reminded SKI that it had been directed many times to begin work on Palm Circle and that these units were made available. Furthermore, the contracting officer stated, SKI had not complied with SP14 inasmuch as all the materials for work were not on hand and ready for use. Concluding that SKI had failed to perform the contract in accordance with its terms, the contracting officer issued a cure notice (R4, tabs 42, 43).

65. On 4 April 1985, SKI wrote the contracting officer, objecting to the

government's refusal to make unoccupied units available pursuant to SP14b. SKI stated that its schedule was to start work in Area I at 102 Oak and work consecutively until completed. SKI also inquired if the government was interested in negotiating a termination for the convenience of the government (R4, tab 44).

66. On 5 April, SKI wrote the government, stating that the government had no authority under SP14 to schedule the order in which housing units were to be worked on. It was SKI's contention that work could not begin on Palm Circle because all the materials were not on hand and ready for use and SKI had given notice on 19 March that work would commence on 26 March at 102 Oak (R4, tab 45).

67. On 18 April 1985, the contracting officer issued a show cause letter stating that SKI's response to the cure notice was inadequate in light of the government's directions to commence work on Palm Circle. The contracting officer expressed doubt as to whether SKI intended to perform the contract and demanded concrete evidence of an intention to perform. In light of the contracting officer's doubt as to SKI's intentions, he suspended material payments pending satisfactory proof of SKI's intent to begin work at Palm Circle (R4, tab 46).

68. On 25 April 1985, SKI responded to the show cause letter and alleged that the parties had previously agreed that work would begin in unoccupied units in Area I and that the area to start work had not been changed by modification

P00001, only whether the units would be occupied or unoccupied was changed. SKI alleged that the government's refusal to allow SKI to begin work on Oak Drive was stop work order and had created delay costs and the suspension of material payments was a breach of contract. SKI concluded that if the government reinstated material payments, work could commence at Palm Circle within 90 days (R4, tab 47).

69. On 9 May 1985, the contracting officer notified SKI that its response to the show cause letter was inadequate and the contract was being forwarded to a Termination Contracting Officer (TCO) for evaluation (R5, tab 48).

70. On 29 May 1985, SKI notified the TCO that it had invested all of its available resources on the contract. SKI also informed the TCO of it

interpretation of SP14 that would allow SKI to work at anytime on unoccupied units (R4, tab 55).

71. On 5 June 1985, SKI sent the TCO a \$14,744.80 invoice allegedly for material which had been ordered and could not be cancelled. SKI requested that it be allowed to start work and alleged that it was never the government's intention that SKI be allowed to perform the contract (R4, tap 56).

72. On 6 June 1985, SKI notified the contracting officer that it had begun work on 108 Palm Circle. SKI was reminded that the unit was occupied and that the contract required all of the material to be on hand and ready for use, and work could not start until the 7 day notice requirement had been met. Therefore, the contracting officer

stopped SKI's work (SR4, tabs 33, 57, 95 reports 12-14).

73. Also on 6 June, a meeting was held to determine if SKI had the necessary materials on hand to perform the work. Mr. McDonald stated that he had the necessary material on hand but changed that statement, admitted that SKI did not have the roofing material, fill dirt, or cement and gravel. The government inventoried SKI's material and found other items not on hand and ready for use (SR4, tabs 34, 95 reports 12-14).

74. On 7 June 1985, the parties met and SKI was directed not to start work until all the materials for 108 Palm Circle were on hand and ready for use and that work could not commence until the seventh day following SKI's notice that

it was ready to start work on a unit (SR4, tab 35).

75. On 10 June 1985, the government gains inventoried SKI's materials. Some of the roofing material had arrived, but the windows for the Palm Circle units were not present and had not even been ordered until the prior week (Sr4, tab 95 report 17).

76. On 13 June 1985, SKI began work on 108 Palm Circle. Mr. McDonald told the inspectors that the windows for the Palm Circle units were in inventory. A check of SKI's inventory revealed that they were not. The contracting officer then stopped SKI's work and Mr. McDonald agreed to notify the government when all the materials were on hand and ready for use (R4, tab 58; SR4, tabs 40, 95 reports 20-22).

77. Although it is SKI's allegation that it did not have sufficient funds available to purchase the Palm Circle material because it had already purchased the Oak Drive material, Mr. Skip Kirchdorfer testified that SKI never attempted to compute how much the Palm Circle material would cost. SKI also did not present any financial statements that show that it was financially unable to purchase the Palm Circle material at any time. Mr. Skip Kirchdorfer testified that he did not know what SKI's financial status was at that time but the additional material purchase would have presented a severe cash flow problem. Based on this, we are unable to find that SKI was financial unable to purchase the Palm Circle materials at any time during performance of the contract (tr. 4/86-87, 122-26.